APPENDIX

SECTION 1.

Statutes and Regulations Involved

Section 800 and Schedule A-8 of Title VIII of the Revenue Act of 1926, as amended by Section 725 of the Revenue Act of 1932, are as follows:

"Sec. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax."

"8. *Conveyances: Deed, instrument, or writing*, delivered on or after the 15th day after the date of enactment of the Revenue Act of 1932 and before July 1, 1934 (unless deposited in escrow before April 1, 1932), whereby any *lands, tenements, or other realty sold* shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direc-

tion, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 and does not exceed $500, 50 cents; and for each additional $500 or fractional part thereof, 50 cents. This subdivision shall not apply to any instrument or writing given to secure a debt." (Emphasis throughout supplied unless otherwise noted).

Regulations 71, promulgated to enforce the above statutory provisions, provide:

"Art. 79. 'Sold' defined.—The term 'sold' imports the transfer of the absolute or general title for a valuable consideration or price."

"Art. 84. *What constitutes real property determinable by law of State where located.*—(a) What constitutes 'lands, tenements or other realty' is determinable by the law of the State in which the property is situated. Standing timber is ordinarily held to be real estate and where so held the deed transferring it is subject to the tax."

"Art. 108. *Leases on real property.*—Leases on real property are not subject to the tax."

SECTION 2.

Short History of Statutes Requiring Documentary Stamps on Conveyances of Land

(Referred to in Note 2)

The Stamp Tax on conveyances of land, tenements or other realty was first introduced into our taxing acts by the War Revenue Act of June 13, 1898 (1939-1 C B (Part 2) page 16); similar taxes were imposed

by various acts down to and including the Revenue Act of 1914. In 1918 a stamp tax on such conveyances was provided for in language identical with the stamp tax statute in effect at the time this case arose. Title XI, Sec. 1100, Schedule A-7 of the Revenue Act of 1918. The statute as thus written was carried forward in the 1924 Act as Schedule A-5. This provision of the 1924 Act was repealed without substitution by the 1926 Act, but was added as Section 800, Schedule A-8 by Section 725 of the 1932 Act. Article 84 of Regulations 71 (1932 Act), defining lands, tenements or other realty according to State law, was first promulgated as a regulation construing the Act taxing conveyances of realty in 1924 as Article 29 of Regulations 55. Article 84 is a verbatim reproduction of Article 29.

SECTION 3.

(Referred to in Note 3)

S. T. 868, 1937-2 C. B. p. 527:

"Advice is requested whether the instruments hereinafter described conveying certain interests in oil and gas covering lands situated in Kansas and Texas are subject to the stamp tax on conveyances imposed by Schedule A-8 of Title VIII of the Revenue Act of 1926, as added by section 725 of the Revenue Act of 1932.

The law imposes a stamp tax on any "* * * Deed, instrument, or writing * * * whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers * * * when the consideration or value of the interest or property conveyed, exclusive of the value of any

lien or encumbrance remaining thereon at the time of sale, exceeds $100 * * *." What constitutes "lands, tenements, or other realty" is determinable by the law of the State in which the property is situated. (Article 84, Regulations 71).

The following described instruments covering lands in Kansas and Texas are involved:

1. *Sale of oil and gas royalty.*—The grantor for a specified consideration grants, sells, conveys, assigns and delivers to the grantee forever an undivided interest in and to all of the oil, gas, and other minerals that may be produced from certain designated lands, together with the right to drill and explore such lands for oil and gas and other minerals and remove the same therefrom, subject to the terms of an existing oil and gas lease covering such lands, the grantee to receive all royalties, money rentals, and bonuses payable under such lease.

2. *Mineral deed.*—The provisions of this instrument are in all material respects the same as those set forth in (1).

3. *Sale of oil and gas royalty.*—The only material difference between this instrument and that described in (1) is that its duration is for a term of years and as long thereafter as oil and/or gas is produced from the property or the propetry is being developed or operated. * * *

* * * * *

In Texas oil and gas are subject to ownership in place (Mills and Wellingham, Law on Oil and Gas, section 35). In *Sheffield v. Hogg, et al.*, and *Federal Royalty Co. v. State* (77 S. W. (2d) 1021), the Supreme Court of Texas held that the lessor's in-

terest in the minerals and royalties under various kinds of oil and gas leases covering lands in Texas constituted real estate.

In view of the foregoing, it is held that each of the instruments in question constitutes a conveyance of realty subject to stamp tax under Schedule A-8 of Title VIII of the Revenue Act of 1926, as added by section 725 of the Revenue Act of 1932."

SECTION 4.

(Referred to in Notes 4 and 8)

G. C. M. 913, C. B. V-2, p. 255:

"The question involved is as to whether instruments which purport to convey the absolute right to oil and gas in place, in Louisiana, or which purport to lease property in that State with the attendant right to extract such oil and gas from the soil and convert the same to the use of the lessee, are "conveyances of land, tenements, or other realty" within the meaning of Schedule A-5 of the Revenue Act of 1924, under the provisions of which there is imposed a stamp tax on instruments granting, assigning, transferring, vesting, or otherwise conveying real property.

Since under the provisions of Schedule A-5 of the Revenue Act of 1924 the stamp tax is imposed upon instruments effecting the conveyance of realty, in order to determine if oil and gas leases are to be taxed under this title it is first necessary to determine if by the terms of such instruments there are in fact conveyances of realty. In passing upon questions of this nature the Bureau has taken the position that what constitutes real prop-

erty is a matter to be determined by reference to the law of the State in which the property is situated. (Art. 29, Regulations 55, 1924 edition). It is, therefore, necessary to have recourse to the substantive law of the State of Louisiana, and in so doing, since it is found that the Louisiana Code is silent on the subject, the answer to the proposition presented must be secured as a result of a review of the decisions of the Louisiana courts. * * *

It would seem beyond doubt that the Supreme Court of Louisiana has definitely determined the jurisprudence of that State as being that oil and gas in place are not subject to absolute ownership as specific things apart from the soil of which they form a part; and a grant or reservation of such oil and gas carries only the right to extract the minerals from the soil, which is an incorporeal right, and, therefore, personal property. It is likewise clear that the Supreme Court of Louisiana has determined that the assignment of such a grant or reservation is not a conveyance of real property. * * *

* * * * *

The nature of the property interests in an oil and gas lease or a conveyance of oil and gas in place in the State of Louisiana seems to be settled by the decisions of the Louisiana Supreme Court as referred to above. Those decisions may be stated as being to the effect that there is no such property right in oil or gas in place as may be the subject of a conveyance, and, further, that a grant of such oil or gas, or a lease of land for the purpose of extracting such oil or gas, is at most a grant of the right to extract such minerals from the soil and

not a conveyance of real estate. The Supreme Court of the United States has indicated conclusions to the same effect in construing statutes relative to oil and gas in other jurisdictions. (Ohio Oil Co. v. Indiana, 177 U.S. 190, 20 Supreme Court 576). It has also been held by the Supreme Court of the United States with respect to the property interests in a lease of a mine as follows:

> "The propriety of a lease for the purpose of developing and working mines is recognized by all the cases and the rule established by the great weight of authority that such leases do not constitute a sale of any part of the land."

(Von Baumbach v. Sargent Land Co., 242 U.S. 517, which was in affirmation of the decision of the Supreme Court of Minnesota in the case of State v. Evans, 99 Minn. 220, 98 N.W. 958). * * *

For the reasons stated above, this office is of the opinion that instruments which purport to convey the absolute property right to oil and gas in place in Louisiana, or which purport to lease property in that State with the attendant right to extract such oil and gas from the soil and convert the same to the use of the lessee, are not conveyances of realty within the meaning of Schedule A-5 of the Revenue Act of 1924, and, accordingly, are not subject to the stamp tax imposed thereunder."

A. W. GREGG,

General Counsel, Bureal of Internal Revenue.

G. C. M. 22,132, I R B No. 27 (July 1, 1940) p. 23:

"An opinion is requested whether the instruments hereinafter described affecting oil, gas, and

other minerals, and rights thereto, located in and under lands situated in Louisiana constitute conveyances of realty subject to stamp tax under section 3482 of the Internal Revenue Code, as amended by section 1 of the Revenue Act of 1939.

The following types of instruments are presented:

(1) A mineral deed;

(2) A lease or royalty deed of indefinite duration (such as those containing the usual "thereafter" clause whereby the lessee or grantee may explore for and extract oil and/or gas for a definite period and "thereafter as long as oil and/or gas is produced");

(3) A royalty deed of unlimited duration;

(4) Assignments of the foregoing instruments;

(5) A royalty deed for a limited period, i.e. having a fixed time for termination. * * *

It was held in G. C. M. 913 (C. B. V-2, 255 (1926) (syllabus) that—Instruments which purport to convey the absolute property right to oil and gas in place in Louisiana, or which purport to lease property in that State with the attendant right to extract such oil and gas from the soil and convert the same to the use of the lessee, are not conveyances of realty within the meaning of Schedule A-5 of the Revenue Act of 1924, and are not subject to the stamp tax imposed thereunder.

Act No. 205 of 1938 (Louisiana), approved July 5, 1938, provides in part as follows:

> Section 1. * * * That oil, gas and other minerals leases, and contracts applying to and af-

fecting such leases or the right to reduce oil, gas or other minerals to possession, together with the rights, privileges and obligations resulting or flowing therefrom, are hereby defined and classified as *real rights and incorporeal immovable property*, and may be asserted, protected and defended in the same manner as may be the ownership or possession of other immovable property by the holder of such rights, without the concurrence, joinder or consent of the landowner, and without impairment of rights of warranty, in any action or by any procedure available to the owner of immovable property or land.

Section 2. That this act shall apply to all such transactions whether entered into prior to the passage of this Act or not.

Act. No. 205, supra, defines and classifies "mineral leases, and contracts applying to and affecting such leases or the right to reduce oil, gas or other minerals to possession, together with the rights, privileges and obligations resulting or flowing therefrom, * * * as real rights and incorporeal immovable property * * *." The purpose of the statute was to overcome the effect of the decision of the Supreme Court of Louisiana in *Gulf Refining Company of Louisiana v. Glassell, et al.*, (171 So. 846, 180 La. 190) that the holder of a mineral lease had not a "real right" in the leased land and therefore could not institute successfully a petitory or possessory action. (Allison v. Maroun, 190 So. 408; 193 La. 286). * * *

The effect of Act No. 205, supra, was to place the leasing of the right referred to above in the same category as a sale or reservation of the right.

The question then arises whether such real right in the land or right of servitude on the realty is within the meaning of the phrase "lands, tenements, or other realty" as used in section 3482, supra. In this connection it is to be observed, as heretofore pointed out, that under the present status of the Louisiana law a mineral deed and a mineral lease are in the same category for the purpose of determining this question. * * *

In view of the foregoing, it is the opinion of this office, that, under the laws of Louisiana, mineral deeds which convey the absolute property right to oil, gas, or other minerals; oil, gas or other mineral leases or royalty deeds of indefinite duration (such as those containing the usual "thereafter" clause); royalty deeds of unlimited duration; or an assignment of any of the foregoing instruments, constitute conveyances of realty subject to stamp tax under section 3482 of the Internal Revenue Code, as amended; and that a royalty deed of limited duration with respect to such minerals is a chattel real or personal property and is not taxable as a conveyance of realty.

G C M 913 (C. B. V-2, 255 (1926)) is revoked in so far as it applies to oil, gas or other mineral deeds, and its application to oil, gas, or other mineral leases is limited to such leases as were executed prior to the effective date of Act No. 205 of 1938, supra."

J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue.

SECTION 5.

(Referred to in Notes 7 and 15)

In the following States oil and gas leases and various instruments pertaining to the mineral estate are excluded from the operation of Section 800, Schedule A-8 of the Revenue Act of 1926, as amended: Oklahoma, G. C. M. 21,702, 1939-2, C. B. 383; Kansas, S. T. 872, 1938-1, C. B. 546; West Virginia, G. C. M. 14348, XIV-1, C. B. 427; and, until July 5, 1938, Louisiana, G. C. M. 913, V-2, C. B. 255, and G. C. M. 22,132 No. 27 I. R. B. (July 1, 1940), page 23. Indiana probably falls within this category.

In other States oil and gas leases and similar instruments are subjected to the operation of the documentary Stamp Tax Act: Arizona, Nebraska and South Dakota, S. T. 881, 1939-1 (Part 1), C. B. 359; Arkansas, G. C. M. 16,510, XVI-1, C. B. 416; California, G. C. M. 16,934, XV-2, C. B. 364; Kentucky, S. T. 794, XIII-2, C. B. 418; Illi,-nois S. T. 881, 1939-1 C. B. 359; Iowa, S. T. 888, 1939-2 C. B. 380; Pennsylvania, G. C. M. 17,026, C. B. Dec. 1936, p. 366.

SECTION 6.

(Referred to in Note 17)

Differences between *Interests in realty* and *Lands, Tenements or other Realty:*

An interest in realty is far more inclusive than "lands, tenements or other realty." A lien, a lease for a term of years, a profit *a prendre*, a right of way, an easement, a contract to purchase or sell

lands, an inchoate right of dower, ground rights, water rights, and other rights and privileges pertaining to land are "interests in realty." (Words & Phrases, Vol. 22, pp. 63-76). Yet, since 1918, the Treasury Department has consistently ruled that "leases on real property are not subject to the tax" (Art. 108, Reg. 71); it is ruled that a sale "imports the transfer of the absolute or general title" (Art. 79, Reg. 71); that "no tax is imposed upon an option for the purchase of real property or upon a contract for the sale of real property" (Art. 91, Reg. 71); that a conveyance of the inchoate right of dower, prior to assignment thereof, is not subject to stamp tax (Art. 84 Reg. 71); it has been ruled that a fifty year mining lease is not subject to the tax (S. T. 54, Sales Tax Rulings Jan.-June, 1921, p. 87).

In Oklahoma an oil and gas lease is "interest in realty" (Commissioner v. McKinney, C C A 10, 87 Fed. (2d) 811; Danciger Oil & Refining Company v. Burroughs, C C A 10, 75 Fed. (2d) 855), but the Bureau of Internal Revenue has uniformly ruled that the execution and delivery of such a lease is not a sale of lands, tenements or other realty. G. C. M. 21,702, 1939-2, C. B. 383. The same is true with respect to West Virginia, Kansas and, until July 5, 1938, Louisiana. See Section 5 of this Appendix, p. 27. The Bureau has in general been guided by the following ruling: "The term 'lands, tenements or other realty' as used in this statute clearly means that estate or interest in lands known as real property, which must be an estate for life or a greater estate. Any less estate, as for a number of years, does not amount to a fee but is a chattel real or personal property." G. C. M. 11,732, C. B. XII-1, p. 439.